IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 269 OF 1991

1. Shri Raghunath Gangadhar Kakade
2. Shri Pandurang Ramchandra Kakade .. Appellants
(Org.Plffs.)

Vs.

1. Shri Chagan Baburao Kapse
2. Manik Baburao Kapse
3. Padminibai w/o Baburao Kapse
4. Shri Sudhakar Baburao Kapse
5. Shri Popat Baburao Kapse .. Respondents
(Nos.4 and 5 deleted as per (Org.Defts.)
Ct's order dtd.11-8-04 passed
in C.A. No.1244/04.)

Mr. A.A. Kumbhakoni with Mr. Tejas Deshmukh for appellants.
Mr. Niranjan Shimpi h/f Mr. P.K. Dhakephalkar for Respondent No.1.
Respondent Nos.2 and 3 though served, absent.

CORAM: B.H. MARLAPALLE, J.

Date : December 20, 2005.

ORAL JUDGMENT:

1. This second appeal arises from the decree passed by the learned Civil Judge, Junior Division at Mohol on 24/1/1985 partly decreeing R.C.S. No.187 of 1980 and confirmed by the learned 4th Additional District Judge at Solapur vide his Judgment and Order dated 19/4/1990 in Regular Civil Appeal No.209 of 1985. The appellants had instituted R.C.S. No.187 of 1980 and the learned Civil Judge, Junior Division at

Mohol declared that they are the owners of agricultural land in Gat No.73 of village Ardhanari in Mohol Taluka, District Solapur to the extent of 1/6th share only. While admitting this second appeal on 21/10/1991, the substantial questions of law, as required under Section 100 of C.P.C., were not framed and during the course of arguments the learned counsel for the plaintiffs submitted that the substantial questions of law have been framed in the appeal memo and they are as under:-

(a) When the appellants were not a party to Regular Civil Suit No.32 of 1973 and the decree passed in the said suit was not registered as required under Section 18 of the Indian Registration Act, it ought to have held that the appellants are bonafide purchasers for value without notice.

(b) When the appellants had produced documentary evidence to show that the deceased Baburao had utilised the consideration which he had received from the appellants to satisfy his debts, it ought to have held that the

agreement and sale deed in respect of the suit lands was for the benefit of the family and hence binding on the other members.

2. The suit land admeasured about 7 hectares and 60 Ares located in Gat No.73 of village Ardhanari in Mohol Taluka and admittedly it was purchased by Shri Baburao Kapase vide a registered sale deed dated 15/11/1957. The plaintiffs claimed that the defendants' father Baburao Kapase agreed to sell the suit land for a consideration of Rs.14,000/- and the agreement for sale (Exh.57) came to be signed on 13/7/1976, on payment of Rs.2000/- out of the total consideration. On the same day possession of the suit land was handed over to the plaintiffs by Baburao vide Kabja-Pavati at Exh.58 and on 14/2/1977 a supplementary agreement (Exh.59) for sale was signed between the parties when the plaintiffs paid a further sum of Rs.3,500/- to Baburao. On 1/12/1977 Baburao was paid an additional sum of Rs.8,500/- and the sale deed (Exh.60) was signed and registered. Baburao died sometimes in the year 1979 and the suit land remained in possession of the plaintiffs. However, in the meanwhile Regular Civil Suit No.32 of 1973 filed by

the defendants against Baburao Kapase came to be decreed on 17/12/1977 by a declaration that the present defendants were entitled to 5/6th share in the suit land and under Section 54 of C.P.C. the partition was directed to be effected so as to hand over the possession to the defendants. The plaintiffs did not take any steps for being impleaded as defendants though they had knowledge of R.C.S.No.32/1973. Instead they filed Regular Civil Suit No.187 of 1980 on or about 21/11/1980 for a declaration that they are the owners of the suit land and the decree passed in Regular Civil Suit No.32 of 1973 was not binding on them. They also prayed for an order of permanent injunction against the defendants. The plaintiffs also prayed for a declaration that the decree obtained in Regular Civil Suit No.32 of 1973 was a collusive decree between the defendants and their late father Baburao Kapase.

3. On behalf of the plaintiffs, Plaintiff No.2 Pandurang Kakade was examined as P.W.1, Anandrao Deshmukh as P.W.2, Sakharam Kulkarni as P.W.3 and Dadashiv Varade as P.W.4. Whereas the defendants examined Vedvyas Narayan Avadhane as D.W.1 so as to

produce the record in R.C.S. No.32 of 1973. He was an employee from the Court. Vijaysinh Jahagirdar, Advocate was examined as D.W.2 and Defendant No.1 Chagan Kapase was examined as D.W.3. Certified copy of the mutation entry no.451 dated 27/12/1957 is at Exh.44, the 7 x 12 extract of the suit land at Exh.45, a copy of the Written Statement filed by Baburao contesting R.C.S. No.32/73 is at Exh.49 and his depositions in the said suit at Exh.48, whereas the copy of the decree dated 17/12/1977 is placed on record at Exh.71 and the Judgment is at Exh.74.

4. The learned counsel for the appellants submitted that the decree passed in R.C.S. No.32 of 1973 was not binding on them and it was a decree collusion. The plaintiffs did not have any knowledge of R.C.S. No.32/73 and they were the rightful owners of the suit land. The sale transaction between the plaintiffs and Baburao Kapase was a genuine transaction and he was in need of money for the maintenance of the family and to pay the debts he had incurred. It was also contended that the suit land was a self acquired property of Baburao and he was free to dispose it off as per his decision and Baburao

colluded with his family members and allowed the present defendants to succeed in R.C.S. No.32/73 for a decree of partition.

5. At the threshold it requires to be noted that the plaintiff no.2 was not a party to the agreements for sale at Exhs. 57 and 59. His name appeared for the first time in the sale deed at Exh.60 which was executed within few days after his father appeared as a witness in support of Baburao in R.C.S. No.32/1973. The plaintiff No.1 is the cousin of the father of plaintiff No.2 and as per the defendants, both the plaintiffs were staying in the same house at Begampur village. The challenge to the decree passed in R.C.S. No.32/1973 was required to be examined on these set of facts.

6. It is imperative to record some of the findings made by the learned Civil Judge, Junior Division, in his Judgment dated 17/12/1977 deciding R.C.S. No.32 of 1973 (Exh.74). Some of the relevant observations are as under:-

(a) The suit land was purchased from the consideration of the sale of ancestral agricultural land in village Bhalwani.

(b) Extract of mutation entry no.7614 was placed on record at Exh.30 showing that on 22/9/1960 Baburao had made an application for the mutation of the suit land in the name of all his sons and the mutation was sanctioned on 25/10/1960.

(c) Baburao had examined D.W.2 Ramchandra Pralhad Kakade on or about 25/11/1977 and Ramchandra had stated while in the witness box that he had lent Rs.700/- and his cousin brother Raghunath had lent Rs.1000/- to Baburao and at the same time Baburao had returned only Rs.150/-. Ramchandra D.W.2 was a tutored witness and his testimony was unreliable.

(d) The sale deed dated 15/11/1957 was placed on record at Exh.29 and it was in the custody of Baburao's wife Padminibai. There was a joint account of Baburao and Padminibai in D.C.C. Bank at Modnimb and money was withdrawn from this account around the

time the sale deed was signed.

(e) The suit was contested by Baburao by filing his Written Statement at Exh.14 and he had contended that the suit land was his self acquired property and none of the plaintiffs in R.C.S. No.32/73 had legal claim for partition. Baburao had also examined himself as D.W.1 and D.W.2 was the father of the present plaintiff no.2.

7. On assessment of the oral and documentary evidence, as placed in the instant case, the trial court recorded a finding that the plaintiffs were not entitled for the declaration as the decree passed in R.C.S. No.32/73 was not obtained by fraud or in collusion with deceased Baburao and, therefore, it could not be said that it was not binding on the plaintiffs. As per the trial court the plaintiffs succeeded in proving their ownership only to the extent of Baburao's share i.e. 1/6th as the sale transaction at Exh.60 had taken place between Baburao and the plaintiffs. At the same time it was observed by the trial court that the father of plaintiff no.2 was examined in R.C.S. No.32/73 on 25/11/1977 and

within few days the sale deed dated 1/12/1977 at Exh.60 came to be signed. The defendant no.1 in his depositions before the trial court clearly stated that his father Baburao was staying at Begampur and was in the employment of Ramchandra Kakade, the father of plaintiff no.2. He further stated that plaintiff no.1 and Ramchandra Kakade were residing in one house. All the defendants were staying away from Baburao for about 14 years, at Devdi and they were maintaining themselves. The trial court, therefore, recorded a finding that the plaintiffs were aware of the pendency of R.C.S.No.32/73 and during the pendency of the said suit the sale transaction documents, namely, Exh.57 to 60 came to be signed between the plaintiffs and Baburao. The defendant no.3 also stated that the plaintiffs were cultivating the suit land prior to the filing of R.C.S. No.32/73 as Bataidars (tenants) and the sale transaction in terms of the documents at Exhs.57 to 60 was carried out only to defeat the said suit for partition which was already pending. As per the defendant no.1 it was a transaction in collusion between the plaintiffs and deceased Baburao. Both the courts below have recorded a concurrent finding that the plaintiffs were aware of the pendency of R.C.S.

No.32/1973 and despite they proceeded to enter into the sale transaction with Baburao in respect of the very same property and consequently the transaction was hit by provisions of Section 52 of the Transfer of Property Act, 1882. It also requires to be noted that the plaintiff no.2, in his cross-examination, admitted that his uncle plaintiff no.1 was present in the court premises but he did not step in the witness box though the documents at Exh.57, 58 and 59 are executed in his favour. The testimony of Shri Jahagirdar, Advocate, has also been duly considered by both the courts below to hold that R.C.S. No.32/73 was hotly contested by deceased Baburao Kapase. Thus the concurrent findings recorded by both the courts below do not suffer from any infirmities in appreciating the facts as well as the legal rights of the respective parties and, therefore, the challenge to the said orders passed by both the courts below is devoid of merits. Both the substantial questions of law as argued by the learned counsel for the plaintiffs stand answered against them.

8. In the premises, this second appeal fails and the same is hereby dismissed with costs.

(B.H. Marlapalle,J.)